

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

76-7523

United States Court of Appeals

FOR THE SECOND CIRCUIT

RUTH RADOW and SEYMOUR RADOW,

Plaintiffs-Appellants,

--against--

MESSRS. GRENITO, PETERSON, TRAPANI, WALKER, ROSE, YACHNIN and WEKNER,
Constituting the Board of Zoning Appeals of the Town of Hempstead,
State of New York, and THE FOURTH OCEAN PUTNAM CORPORATION,
and THE TOWN OF HEMPSTEAD,

Defendants-Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF MESSRS. GRENITO, ET AL.,
CONSTITUTING THE BOARD OF ZONING APPEALS OF THE
TOWN OF HEMPSTEAD, STATE OF NEW YORK, AND THE
TOWN OF HEMPSTEAD, DEFENDANTS-APPELLEES

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Messrs. Grenito, Peterson, Trapani, Walker,
Rose, Yachnin and Wekner, Constituting the
Board of Zoning Appeals of the Town of
Hempstead, State of New York, and
The Town of Hempstead
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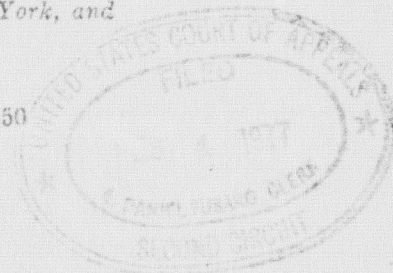


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UNITED STATES COURT OF APPEALS
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RUTH RADOW and SEYMOUR RADOW,

Plaintiffs-Appellants,

-against-

MESSRS. GRENITO, PETERSON, TRAPANI,
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Constituting the Board of Zoning
Appeals of the Town of Hempstead,
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OCEAN PUTNAM CORPORATION, and THE
TOWN OF HEMPSTEAD,

APPEAL FROM
UNITED STATES
DISTRICT COURT
FOR THE EASTERN
DISTRICT OF NEW
YORK -
Docket No.
76-7523.

Defendants-Appellees.

- - - - - X

BRIEF FOR MESSRS. GRENITO, ET AL.,
CONSTITUTING THE BOARD OF ZONING
APPEALS OF THE TOWN OF HEMPSTEAD,
STATE OF NEW YORK, AND THE TOWN OF
HEMPSTEAD, DEFENDANTS-APPELLEES.

PRELIMINARY STATEMENT

This is an appeal from an order of Judge Jack B. Weinstein, United States District Court, Eastern District of New York, which order granted a motion for summary judgment submitted by the defendants-appellees Messrs. Grenito, Peterson, Trapani, Walker, Rose, Yachnin and Wexner, constituting the Board of Zoning Appeals of the Town of Hempstead, State of New York, and the Town of Hempstead, dismissing the action

(appellants appendix pp. 16, 17).

STATEMENT OF ISSUES

1. Have the defendants-appellees deprived the plaintiffs-appellants of their fundamental, personal and constitutional right to life, liberty and enjoyment of their home?

2. Have the defendants-appellees acted in contravention of the National Flood Insurance Act of 1968, as amended (42 U.S.C.A. §§ 4001-4127), or the regulations promulgated by the U. S. Department of Housing and Urban Development Federal Insurance Administration (24 Code of Federal Regulations (CFR) Chap. X - Federal Insurance Administration, subchap. B, National Flood Insurance Program) (appellants appendix pp. 59-64).

POINT I

THE DEFENDANTS-APPELLEES MESSRS. GRENITO, PETERSON, TRAPANI, WALKER, ROSE, YACHNIN AND WEXNER, CONSTITUTING THE BOARD OF ZONING APPEALS OF THE TOWN OF HEMPSTEAD, STATE OF NEW YORK, AND THE TOWN OF HEMPSTEAD, HAVE NOT VIOLATED STATE OR FEDERAL LAW.

The defendants-appellees Messrs. Grenito, Peterson, Trapani, Walker, Rose, Yachnin and Wexner,

constituting the Board of Zoning Appeals of the Town of Hempstead, State of New York, and the Town of Hempstead commenced participation under the provisions of the National Flood Insurance Act of 1968, as amended, pursuant to Town Board Resolution No. 2092-1971, adopted August 10, 1971 (appellants appendix pp. 18-19). By virtue of its entry into the program, the residents of the Town of Hempstead may obtain financial protection against flood losses, and the Town, itself, enhances its overall value of its flood plains and insures the increased safety of its citizens. Insurance coverage for individuals is made available through the National Flood Insurance Association which is an association of private insurance companies formed specifically to provide for the insurance under the cooperative government-private industry program. The contentions by the plaintiffs-appellants that they may be subject to loss of eligibility to renew their flood insurance due to the granting of a zoning use permit is without contention and not supported by any evidence at any stage of this action (appellees appendix p. 39b).

Defendant-appellee The Fourth Ocean Putnam Corporation applied to the Board of Zoning Appeals of the Town of Hempstead for certain special use permits and variances to demolish an existing hotel facility

and to erect a new hotel complex. The decision of the defendants-appellees Messrs. Grenito, Peterson, Trapani, Walker, Rose, Yachnin and Wexner, constituting the Board of Zoning Appeals of the Town of Hempstead, State of New York, and the Town of Hempstead, to grant a special use permit for the construction of a hotel and certain variances on Ocean Boulevard between Putnam Boulevard and Vernon Avenue, Atlantic Beach, Town of Hempstead, New York, was reached after a series of public hearings pursuant to the applicable provisions of the Town Law of the State of New York. A copy of the decision of the Board of Zoning Appeals is reproduced in the appellees appendix pp. 42b-61b. The plot plan of the proposed hotel, submitted as an exhibit before the Board of Zoning Appeals is on page 1b in the appellees appendix.

The issues raised in the Federal Court before Judge Weinstein were previously raised upon a review pursuant to Article 78 of the Civil Practice Law and Rules of New York, initiated by a neighbor of the plaintiffs-appellants, and the Federal questions involving the constitutional rights of citizens residing within the area of Atlantic Beach, Town of Hempstead, Nassau County, New York, were an issue in both the State Court and the District Court. The

applicable portion of Judge Suozzi's opinion as same related on the issue of the National Flood Insurance Act is set forth at page 13 of the appendix, and the entire decision is at pages 2b-38b of the appellees appendix. There has been no appeal from that proceeding. In Drewett v. Aetna Casualty & Surety Company, 405 F. Supp. 877 (W. D. Louisiana, 1975), the District Court determined that Congress intended only Federal law to apply to claims under the National Flood Insurance Act and that any State statute that varied or contradicted Federal legislation should not apply. When the National Flood Insurance Act was considered before Justice Joseph Suozzi in New York State Supreme Court, and after a full review of the arguments advanced by the objectors to the use of the premises for the construction of a new hotel, Justice Suozzi found that the defendants-appellees neither varied nor altered the provisions of the National Flood Insurance Act and further determined that "the objections that the Town will become ineligible to participate in the Program because of any action by the Board of Zoning Appeals is misplaced . . ." It is respectfully submitted that the determination of Justice Suozzi as to the state of the law regarding a local municipality's interpretation of a Federal statute, and

said local municipality's concern to implement the Federal statute, should be given consideration by this Court.

Pursuant to Section 267 of the Town Law of the State of New York, a board of zoning appeals "shall hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this article." The granting of a hotel use by a Board of Zoning Appeals is a special exception use authorized pursuant to Article 12, Sec. Z-1.0(c)(11), a copy of which article is set forth in the appellees appendix at page 62b. The Court of Appeals of the State of New York has stated in North Shore Steak House v. Thomaston, 30 N. Y. 2d 238, 331 N. Y. S. 2d 645, that for an applicant to obtain a special exception permit . . . does not "require the applicant to show that it has been denied any reasonable use of the property but only that the use is contemplated by the ordinance subject only to 'conditions' attached to its use to minimize its impact on the surrounding area", 30 N. Y. 2d at 244, 331 N. Y. S. 2d at 649.

The conditions attached to the Board of Appeals' determination included that the applicant comply with

Section G-7.1 and all subparagraphs thereunder of Article 14 of the Building Zone Ordinance of the Town of Hempstead, which section is reproduced in the appellees appendix pp. 63b-64b. Essentially, this means that all aspects of the construction are subject not only to Town Board approval but to professional review as follows:

1. Subsequent to site plan approval of the Town Board under Section G-7.1(b), the Department of Buildings of the Town of Hempstead forwards proposed construction plans to the Department of Conservation and Waterways of the Town of Hempstead and the United States Army Corps of Engineers for approval regarding this parcel which is abutting the Atlantic Ocean.

2. The applicant must comply with the State Building Construction Code which has been adopted by the Town of Hempstead, and the rules and regulations promulgated pursuant to Article 18 of the Executive Law of the State of New York, may be found in the State of New York Official Compilation of Codes, Rules and Regulations published by the Department of State pursuant to Article IV, § 8 of the New York State Constitution, and must further comply with the rules and regulations pertaining to multiple dwellings that

are found in 9 NYCRR, Part 700. Section 703.3(58) thereof defines the term, generally accepted standard, as "a specification, code, rule, guide or procedure in the field of construction or related thereto recognized and accepted as authoritative." Subsequent to the Town of Hempstead entering the Federal Flood Insurance Program, the United States Army Corps of Engineers' regulations have been officially recognized by the State Building Code Council as a "generally accepted standard" of the State Building Construction Code (appellees appendix 40b and 41b). Therefore, unless the proposed construction plans of the applicant were approved by the United States Army Corps of Engineers in accordance with flood control regulations, the Town of Hempstead would be without authority to issue a building permit for the construction of the subject hotel at the site.

The United States Army Corps of Engineers, in promulgating its regulations for construction in flood-prone areas, has recognized that the Department of Housing and Urban Development regulations (appellants appendix pp. 59-64), issued under the National Flood Insurance Act of 1968 (42 USC 4001-4127), and more particularly Section 4102, "criteria for land management and use - Study and Investigations" thereof,

provide criteria for land management, use and controls within flood-prone areas by requiring the Federal Insurance Administrator to provide land use and control data, or in the alternative, if such data proves insufficient, the community must provide the administrator with minimum standards as set forth in Section 1910.3 of the aforesaid Department of Housing and Urban Development regulations. The obligation is on the local community for application review as to proposed construction. The Town of Hempstead, as a participating community of the flood insurance program and as an adherent to the provisions of the State Building Construction Code, is under an obligation to review construction plans as set forth in the regulations. In the instant matter, no construction plans have yet been submitted for review, pending the determination of the instant action and, therefore, for the plaintiffs-appellants to assert a claim that their property rights to renew their flood insurance policy may be affected by the construction is mere conjecture.

As a practical matter, the construction of a new hotel that will be built in accordance with generally accepted standards of the United States Army Corps of Engineers would offer greater flood protection than the

existing structure on the premises.

CONCLUSION

The order of Judge Weinstein granting the motion for summary judgment on the ground that there is no genuine issue as to any material fact, there is no Federal question and that the defendants-appellees are entitled to a judgment as a matter of law, should be affirmed.

Respectfully submitted,

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Town Attorney

JEFFREY L. STADLER, ESQ.,
Of Counsel

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Defendants-Appellees.

Appeal From United States District Court For
The Eastern District of New York.

Affidavit of Service By Mail

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

Louis Mark, being duly sworn, deposes and says: That
he is over twenty-one years of age: That on the 4th day of
February 1977 he served three copies of the attached Brief For
Messrs. Gremto, et al., Constituting The Board of Zoning Appeals
of the Town of Hempstead, State of New York, and The Town of
Hempstead, Defendants-Appellees, on Ruth Radow and Seymour Radow,
Pro Se, Attorneys for Plaintiff-Appellants, and on Margiotta,
Levitt & Ricciigliano, Attorneys for Defendant-Appellee The Fourth
Ocean Putnam Corporation, by enclosing said copies in fully
post-paid wrappers addressed as follows and depositing same in
The United States Post Office maintained at No. 350 Canal
Street, New York City, New York.

Ruth Radow and Seymour Radow
50 Tioga Avenue
Atlantic Beach, New York 11509

Margiotta, Levitt & Ricciigliano, Esqs.
955 Front Street
Uniondale, New York 11553

Louis Mark
Louis Mark

Sworn to before me this

4th day of February 1977

Deborah C. [Signature]

NEW YORK
NEW YORK

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